

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ROBERT A. SLOVAK,

Plaintiff,

v.

GOLF COURSE VILLAS HOMEOWNERS
ASSOCIATION, *et al.*,

Defendants.

3:13-cv-00569-RCJ-CBC

ORDER

Plaintiff Robert A. Slovak ("Slovak") filed this lawsuit in 2013 seeking quiet title and declaratory relief related to a condominium properly located in Incline Village, Nevada. After several years of litigation, a settlement was reached between the parties. To date, the terms of that settlement agreement have yet to be consummated.

Currently before the court is Slovak's motion for sanctions (ECF No. 218), which arises from the attempts of the parties to follow through with the terms of the settlement agreement. Slovak seeks sanctions against Defendant Wells Fargo Bank, N.A. ("Wells Fargo"), the law firm of Snell & Wilmer, LLP ("Snell"), and individual Snell attorneys Richard C. Gordon and Catherine M. O'Mara (collectively referred to as "the individual attorneys") based on his claim that Wells Fargo failed to provide "original copies" of the note and deed of trust as required by the parties' previous settlement agreement.¹ (ECF No. 218). According to Slovak, the documents Wells Fargo and its counsel tendered as "originals" were, "at best copies or at worst fabricated forgeries". (*Id.*, p. 10). Wells Fargo

¹ In the original motion, Slovak also sought sanctions against Snell attorney, Kelly Dove. Slovak voluntarily withdrew that portion of his motion at the evidentiary hearing on November 28, 2018. (ECF No. 244, p. 4). Based on that withdrawal, the court entered an order denying Slovak's motion to the extent it sought sanctions against Ms. Dove with prejudice. (*Id.*)

1 opposed (ECF No. 222) and Slovak replied (ECF No. 227). Due to the seriousness of
2 Slovak's allegations, the court ordered an evidentiary hearing, which was held on
3 November 28, 2018.

4 For the reasons stated below, Slovak's motion for sanctions (ECF No. 218) is
5 denied.

6 **I. FACTUAL BACKGROUND**

7 **A. Underlying Facts and Procedural History Regarding Settlement Agreement**

8 This case has a long and tortured history that began in 2002 when Wells Fargo
9 agreed to provide Slovak a home equity loan on property in Incline Village, Nevada. To
10 complete this transaction, Slovak signed and executed a note and "Deed of Trust" for the
11 benefit of Wells Fargo, which was recorded in April 2002. Slovak, however, failed to
12 keep up the payments and ultimately defaulted on the loan.

13 After his default, Slovak sued Wells Fargo and various other defendants in state
14 court alleging claims for quiet title and declaratory relief. Wells Fargo removed the case
15 to federal court. (ECF No. 1). After extensive litigation occurred, the parties participated
16 in a settlement conference with the Honorable Valerie P. Cooke on June 3, 2014. (ECF
17 No. 83). At the conclusion of the settlement conference, the parties reached an
18 agreement and the court placed the material terms on the record. (*Id.*) The terms
19 required Slovak to pay Wells Fargo \$280,000, and in exchange, Wells Fargo would
20 reconvey the property to Slovak.

21 Shortly thereafter, trouble arose when the parties could not agree on the
22 language and terms to be included in the written settlement agreement. (See ECF Nos.
23 91, 102). The primary dispute centered upon Slovak's claim that the terms of the
24 settlement agreement required Wells Fargo to return the "original" note and deed of trust
25 to him prior to him providing Wells Fargo with payment. (ECF No. 102). Wells Fargo
26 disagreed asserting that references to returning the note and deed of trust meant only
27 that Wells Fargo would reconvey title to Slovak. Ultimately, Wells Fargo filed a motion to
28 enforce the terms of the settlement agreement. (ECF No. 107). The district court granted

1 Wells Fargo's motion, adopting the report and recommendation entered by the Judge
2 Cooke, who found, in part, that the terms of the settlement did not require Wells Fargo to
3 deliver the original documents. (ECF No. 128).

4 Slovak appealed the decision the Ninth Circuit Court of Appeals, who reversed
5 and remanded for further proceedings. (ECF No. 140).

6 B. Facts and Procedural History Following Remand

7 Following remand, Slovak filed a motion to enforce the settlement agreement
8 contending that the Ninth Circuit's decision required Wells Fargo required to provide the
9 "original" documents to him. (ECF No. 156). Although Wells Fargo continued to contest
10 that it was required to deliver the "original" documents, Wells Fargo claimed it located
11 the original documents and agreed to provide them to Slovak in order for the original
12 settlement terms to be enforced. (ECF No. 165). The court held a hearing on Slovak's
13 motion on February 23, 2018. (ECF No. 215, Ex. 6). In light of Wells Fargo's willingness
14 to tender the original documents, the court ordered to parties to meet and consummate
15 the full settlement agreement. (*Id.*, pp. 14-16). The court directed Wells Fargo to provide
16 Slovak the original note and deed of trust as well as a deed of full reconveyance. (*Id.*,
17 pp. 15-16). Slovak, on the other hand, was ordered to arrange a wire transfer of
18 \$280,000 that would occur immediately upon receipt of the documents. (*Id.*) Finally, the
19 parties were directed to then sign and file a written release of liability and stipulated
20 dismissal with the court at the conclusion of the meeting. (*Id.*)

21 All did not go as planned. On May 10, 2018, the court held a status conference to
22 determine whether the settlement had been completed. (ECF No. 180, Hr'g Minutes;
23 ECF No. 213, Hr'g Transcript). The parties advised the court Slovak had concerns with
24 the authenticity of the "original" documents and wanted the documents forensically
25 examined to determine whether they were truly "originals." (ECF No. 213, pp. 3-5). The
26 court granted Slovak thirty days to conduct the requested forensic analysis. (*Id.*, p. 29).
27 The parties were ordered to either file a stipulation and order to dismiss the case on or
28

1 before June 20, 2018 or to appear for a hearing that would be set on that same day, if
2 the settlement was not completed. (*Id.*, pp. 31-33; see *also* ECF No. 193).

3 On June 20, 2018, the parties re-convened for another hearing. At the hearing,
4 Slovak claimed that the forensic examination conducted on the documents “irrefutably”
5 established that the documents were “forgeries” and claimed Wells Fargo had
6 perpetrated a fraud on the court. (ECF No. 202, Hr’g Minutes; ECF No. 214, p. 3, Hr’g
7 Transcript). Slovak’s claims were based upon two expert reports he received prior to the
8 hearing but did not provide to either the court or opposing counsel. (ECF No. 214, pp. 5-
9 6). Based on seriousness of Slovak’s accusation, but without any evidence to review, the
10 court concluded it could not rule on the still outstanding motion to enforce settlement
11 until it had an opportunity to consider the allegations made by Slovak. (*Id.*, p. 15-16). At
12 this point, Slovak withdrew his motion to enforce without prejudice and indicated he
13 wanted to proceed by filing a motion for sanctions. (*Id.*, p. 17). The court then ordered
14 him to file any motion for sanctions on or before Friday, July 6, 2018. The court noted it
15 would consider an extension of time to file a sanctions motion if that was necessary to
16 comply with the safe harbor provisions contained in Rule 11. (*Id.*, pp. 14, 17.)

17 C. Motion for Sanctions

18 Slovak did not his motion for sanctions on or before Friday, July 6, 2018. Rather,
19 he filed a motion for an extension of time requesting a 7-day extension to July 13, 2018
20 stating he was “almost finished with the motion and [he would] be able to file it as
21 requested.” (ECF No. 207, p. 1.) He indicated he had two legal issues to finish
22 researching and a few exhibits to identify prior to the filing. (*Id.*) The court granted
23 Slovak’s request. (ECF No. 208).

24 When July 13, 2018 arrived, Slovak again failed to file the motion for sanctions.
25 Rather, on the day the motion was due, Slovak once again filed a request for an
26 extension. (ECF No. 209). This time he claimed he had *now* “concluded a motion
27 pursuant to Rule 11 [was] appropriate” and he needed more time to comply with the safe
28 harbor provisions required under the rule. (ECF No. 209, p. 1). This time, Slovak

1 requested an extension of 35 days, which included 21-days to comply with the safe
2 harbor provision and an additional 14-days to file the motion, resulting in a new deadline
3 of August 16, 2018. (*Id.*, p. 2). The court granted Slovak's request over Wells Fargo's
4 objection. (ECF No. 210; 211).

5 On July 19, 2018, Slovak sent a letter to Wells Fargo's counsel that enclosed a
6 document entitled, "Motion for Rule 11 Sanctions." (ECF No. 223, Ex. F). The enclosed
7 motion was only 5 pages long and argued for sanctions under a single legal theory –
8 Rule 11. (*Id.*, pp. 3-7) Slovak asserted that he was providing the enclosed motion
9 pursuant to the safe harbor provision of Rule 11. (*Id.*, p. 2). He further stated that if Wells
10 Fargo did not "voluntarily produce the original note and original deed of trust within 21
11 days of service of the letter and draft motion," he would file the document seeking
12 sanctions against Wells Fargo. (*Id.*). Wells Fargo responded on August 10, 2018
13 asserting that Slovak's motion was unfounded and detailed the various deficiencies in
14 his accusations. (ECF No. 223, Ex. G).

15 Ultimately, on August 17, 2018, Slovak filed a motion for sanctions against Wells
16 Fargo, Snell and the individual attorneys. (ECF No. 218). However, the motion that was
17 filed was not the same motion that was previously served upon Wells Fargo and its
18 counsel. (*Compare* ECF No. 218, *with* ECF No. 223, Ex. F, pp. 3-7). Rather, the motion
19 filed was approximately 11-pages in length and sought sanctions under three separate
20 legal theories – Rule 11, 28 U.S.C. § 1927, and the court's inherent powers. (ECF No.
21 218).

22 The overarching contention of Slovak's motion for sanctions is his argument that
23 Wells Fargo and its counsel failed to provide "original copies" of the note and deed of
24 trust as required by the parties' previous settlement agreement. (ECF No. 218).
25 According to Slovak, the documents Wells Fargo and its counsel tendered as "originals"
26 were, "at best copies or at worst fabricated forgeries." (*Id.*, p. 10). Slovak's argument is
27 premised entirely upon the alleged expert reports and opinions provided by Dr. James E.
28 Kelley and Gary Michaels, who Slovak proffered as experts in the field of forensic

1 document examination. Slovak offered the C.V.s of Dr. Kelley and Mr. Michaels, as well
2 as their respective expert reports, as evidence to support his contentions. (See ECF No.
3 218, Exs. 8-11).

4 According to Dr. Kelley's report, the documents tendered were not originals but
5 were copies made by an ink jet printer. (ECF No. 218, Ex. 10). Mr. Michaels's did not
6 personally examine the documents. (ECF No. 218, Ex. 11). Rather, according to this
7 report, he simply reviewed Dr. Kelley's report and conclusions. Based on that review, he
8 agreed that the documents were not the originals but were copies made by an ink jet
9 printer. However, Mr. Michaels also went one step further concluding the documents
10 were "forgeries." (*Id.*)

11 Wells Fargo opposed the motion for sanctions on August 31, 2018. (ECF No.
12 222). Wells Fargo argued that the court should deny the sanctions for a variety of
13 reasons. Specifically, Wells Fargo challenged Slovak's expert witnesses arguing that
14 their expert opinions and reports should be rejected by the court because neither
15 witnesses' testimony or opinions satisfy the requirements of Federal Rule of Evidence
16 702 or the *Daubert* analysis. (*Id.*, pp. 7-10). According to Wells Fargo, without these
17 expert opinions and reports, there was no evidence in the record to support any finding
18 that the documents tendered were not the originals. Slovak filed his reply on September
19 11, 2018. (ECF No. 225).

20 D. Evidentiary Hearing

21 Due to the seriousness of Slovak's allegations, the court ordered an evidentiary
22 hearing to determine whether the expert opinions and reports offered by Slovak satisfy
23 Rule 702 and *Daubert*. This hearing was held on November 28, 2018. (ECF No. 244,
24 Hr'g Minutes; ECF No. 249, Hr'g Transcript). At that hearing, the court heard testimony
25
26
27
28

1 of Dr. Kelley regarding his qualifications and his expert opinions regarding the
2 documents.² (*Id.*)

3 Both parties submitted various exhibits to support their respective positions.
4 Plaintiff's Exhibits 5-9 and 15 were admitted and Defendant Exhibits 1 and 2 were
5 admitted. The court's analysis and determination in this order relies only upon the
6 admitted exhibits at the hearing, along with Plaintiff's Exhibits 9 and 11, attached to his
7 motion for sanctions, ECF No. 218, which consist of the C.V. for Mr. Gary Michaels and
8 Mr. Michaels's expert report.³

9 **II. ANALYSIS**

10 **A. Legal Standards**

11 Slovak has moved for sanctions under three legal theories: (1) Federal Rule of
12 Civil Procedure 11; (2) 18 U.S.C. § 1927; and, (3) the Court's Inherent authority. A
13 different legal standard applies to each theory, which are as follows.

14 **1. Rule 11**

15 Federal Rule of Civil Procedure 11 provides that when an attorney (or
16 unrepresented party) signs a pleading, motion or other paper, and presents it to the
17 court, the attorney or parties certifies that it "is not being presented for any improper
18 purpose;" "the claims, defenses, and other legal contentions are warranted by existing
19 law or by a nonfrivolous legal argument for extending, modifying, or reversing existing
20

21 ² Slovak also called Jodie Hawkins, the Wells Fargo client representative, to
22 allegedly testify with respect to her role as the Wells Fargo custodian of records for the
23 tendered documents. This testimony was elicited for the separate, but related issue, of
24 the authenticity and originality of the documents. The court granted Slovak's oral request
to bifurcate that determination from the underlying issue of sanctions. This testimony is
unrelated to the question of whether Dr. Kelly or Mr. Michaels's expert opinions are
admissible and will not be addressed herein.

25 ³ At the November 28, 2018 hearing, Wells Fargo was prepared to present a
26 rebuttal expert on forensic document examinations. However, Wells Fargo choose to
27 reserve calling that witness until the court held a subsequent hearing on the bifurcated
28 issue requested by Slovak. Having reviewed the filings on the motion for sanctions, the
admitted exhibits at the hearing, and the testimony presented at the hearing, the court
finds rebuttal expert testimony is not necessary on this issue. Rather, this order is based
strictly on the filings related to the motions for sanctions, the *admitted* exhibits at the
hearing, and Dr. Kelley's testimony.

1 law or for establishing new law;" "the factual contentions have evidentiary support or, if
2 specifically so identified, will likely have evidentiary support after a reasonable
3 opportunity for further investigation or discovery;" and, "denials of factual contentions are
4 warranted on the evidence or ... reasonably based on belief or a lack of information."
5 Fed. R. Civ. P. 11(a), (b)(1)-(4).

6 If the court concludes Rule 11(b) has been violated, after notice and an
7 opportunity to respond have been afforded, appropriate sanctions may be imposed on
8 the attorney, law firm or party that violated the rule. Fed. R. Civ. P. 11(c)(1).

9 A motion for sanctions under Rule 11 must be made separately and describe the
10 conduct that violates the rule. Fed. R. Civ. P. 11(c)(1). It must be served under Rule 5,
11 and the offending attorney or party has 21 days to withdraw or correct the challenged
12 paper, claim, defense, contention or denial. Fed. R. Civ. P. 11(c)(2). If the matter is not
13 withdrawn or corrected within 21 days, the party may then file the motion for sanctions.
14 Fed. R. Civ. P. 11(c)(2). "If warranted, the court may award to the prevailing party the
15 reasonable expenses, including attorney fees, incurred for the motion." Fed. R. Civ. P.
16 11(c)(2). The sanction "must be limited to what suffices to deter repetition of the conduct
17 or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). It may
18 include: "nonmonetary directives; an order to pay a penalty into court; or, if imposed on
19 motion and warranted for effective deterrence an order directing payment to the movant
20 of part or all of the reasonable attorney's fees and other expenses directly resulting from
21 the violation." Fed. R. Civ. P. 11(c)(4).

22 "Rule 11 is intended to deter baseless filings in district court and imposes a duty
23 of 'reasonable inquiry' so that anything filed with the court is 'well grounded in fact,
24 legally tenable, and not interposed for any improper purpose.'" *Islamic Shura Council of*
25 *Southern California v. F.B.I.*, 757 F.3d 870, 872 (9th Cir. 2014) (quoting *Cooter & Gell v.*
26 *Hartmarx Corp.*, 496 U.S. 384, 393 (1990)). There must be "strict compliance" with the
27 safe-harbor provision before a motion for sanctions can be filed. (*Id.*) (citing *Holgate v.*
28 *Baldwin*, 425 F.3d 671, 678 (9th Cir. 2005)).

1 The Ninth Circuit has held that where Rule 11 sanctions are not dispositive of a
 2 claim or defense of a party, a magistrate judge has authority to enter an order (as
 3 opposed to a recommendation) issuing sanctions. See *Maisonville v. F2 America, Inc.*,
 4 902 F.2d 746, 747 (9th Cir. 1990).

5 2. 28 U.S.C. § 1927

6 Sanctions may also be imposed pursuant to 28 U.S.C. § 1927, which states:

7 Any attorney or other person admitted to conduct cases in any court of the
 8 United States or any Territory thereof who so multiplies the proceedings in
 9 any case unreasonably and vexatiously may be required by the court to
 10 satisfy personally the excess costs, expenses, and attorneys' fees
 11 reasonably incurred because of such conduct.

12 28 U.S.C. § 1927. Unlike Rule 11 sanctions, section 1927 sanctions can only be
 13 imposed against an attorney or other person permitted to conduct cases in federal court.
 14 These sanctions may not be imposed against a party to the litigation nor may they be
 15 imposed against a law firm. See *Kaass Law v. Wells Fargo Bank, N.A.*, 799 F.3d 1290
 16 (9th Cir. 2015).

17 Section 1927's language — "unreasonably and vexatiously" — "implies a bad faith
 18 or intentional misconduct requirement not explicit in the statute." *Barnd v. City of*
 19 *Tacoma*, 664 F.2d 1339, 1343 (9th Cir. 1982). Therefore, "[s]anctions pursuant to
 20 section 1927 must be supported by a finding of subjective bad faith." *Blixseth v.*
 21 *Yellowstone Mountain Club, LLC*, 796 F.3d 1004, 1007 (9th Cir. 2015) (internal quotation
 22 marks omitted). Among other circumstances, "bad faith is present when an attorney
 23 knowingly or recklessly raises a frivolous argument." *Id.* (internal quotation marks and
 24 alteration omitted). An argument is frivolous if its resolution "is obvious" or the argument
 25 is "wholly without merit." *Nat'l Mass Media Telecomm. Sys., Inc. v. Stanley*, 152 F.3d
 26 1178, 1181 (9th Cir. 1998) (internal quotation marks omitted).

27 Sanctions under section 1927 are appropriate upon a finding that an attorney
 28 "recklessly or intentionally misled the court." *In re Girardi*, 611 F.3d 1027, 1061 (9th Cir.
 2010). Thus, section 1927 sanctions require bad faith or something akin to bad faith, i.e.,

recklessness plus something more such as frivolousness or an improper purpose. See *Moore v. Keegan Mgmt. Co.*, 78 F.3d 431, 436 (9th Cir. 1996); *Pac. Harbor Capital, Inc. v. Carnival Air Lines, Inc.*, 210 F.3d 1112, 1118 (9th Cir. 2000); *B.K.B. v. Maui Police Dep't*, 276 F.3d 989, 993-94 (9th Cir. 2001). A court retains “substantial leeway” when determining whether to impose sanctions pursuant to section 1927. *Haynes v. City & Cty. of San Francisco*, 688 F.3d 984, 987 (9th Cir. 2012).

3. Court's Inherent Authority

Finally, a federal district court also has inherent authority to sanction conduct abusive of the judicial process. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-46 (1991). This power, however, is to be exercised with restraint and discretion. *Id.* at 44. “Before imposing sanctions under its inherent sanctioning authority, a court must make an explicit finding of bad faith or willful misconduct.” *In re Dyer*, 322 F.3d 1178, 1196 (9th Cir. 2003); see also *Fink v. Gomez*, 239 F.3d 989, 993-94 (9th Cir. 2001). Recklessness, when combined with an additional factor such as frivolousness, harassment, or an improper purpose, may support sanctions. See *In re Girardi*, 611 F.3d 1027, 1061 (9th Cir. 2010); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001); *Fink*, 239 F.3d at 994. Mere negligence or recklessness alone will not suffice. *In re Lehtinen*, 564 F.3d 1052, 1058 (9th Cir. 2009). “[S]anctions are available if the court specifically finds bad faith or conduct tantamount to bad faith.” *Fink*, 239 F.3d at 994.

Inherent power sanctions may be imposed against attorneys, clients, and *pro se* litigants. *Aleyska Pipeline Serv. Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). The court’s “inherent power ‘extends to a full range of litigation abuses.’” *Fink*, 239 F.3d at 992 (quoting *Chambers*, 501 U.S. at 46-47).

The court has discretion to rely on its inherent powers rather than a federal rule or statute. *Fink*, 239 F.3d at 994 (citing *Chambers*, 501 U.S. at 50). Under its inherent power, sanctions may include: fines (see *Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1472-73 (D.C. Cir. 1995)), awards of attorney’s fees and expenses (see *Roadway Express Inc. v. Piper*, 447 U.S. 752, 765 (1980)), and contempt citations (*id.* at 764).

Again, it is clear that “one permissible sanction” under the court’s inherent power is “an assessment of attorney’s fees” “instructing a party that has acted in bad faith to reimburse the legal fees and costs incurred by the other side.” *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 1178, 1186 (2017) (citation omitted).

B. Analysis

Slovak’s motion for sanctions turns solely on whether the documents tendered by Wells Fargo are, as he claims, “at best copies or at worst forgeries.” The evidence Slovak presents to support his claims that the documents are “copies” or “forgeries” are: (1) Dr. Kelley’s affidavit report, (Hr’g Ex. 5); (2) Dr. Kelley’s declaration, (Hr’g Ex. 7); (3) Dr. Kelley’s testimony (Hr’g Tran., pp. 15-165); and, (4) Mr. Michaels’s expert report (ECF No. 218, Ex. 11). Slovak offers Dr. Kelley and Mr. Michaels as “experts” in the field of forensic document analysis.

Therefore, prior to considering the proffered expert opinions from either witness, the court must first determine whether these experts and their opinions satisfy the requirements set for in Federal Rule of Civil Procedure 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and its progeny.

Federal Rule of Evidence 702 governs the admission of expert testimony and evidence. It provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

“Faced with a proffer of expert scientific testimony, the court must determine at the outset ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This usually entails a preliminary assessment of whether the reasoning or methodology underlying the

1 testimony is scientifically valid and of whether that reasoning or methodology properly
2 can be applied to the facts in issue.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509
3 U.S. 579, 589 (1993). The court has discretion under Rule 702 as a “gatekeeper to
4 decide what evidence is relevant, reliable, and helpful the trier of fact.” *Desrosiers v.*
5 *Flight Int'l of Fla. Inc.*, 156 F.3d 952, 961 (9th Cir. 1998).

6 In exercising its gatekeeping function, the court must first determine whether the
7 expert is qualified. To make this determination, the court considers whether the
8 individual has sufficient “knowledge, skill, experience, training or education” in the
9 subject matter of their alleged expertise. Fed. R. Evid. 702. This qualification standard is
10 meant to be broad and to seek a minimal foundation justifying the expert’s role as an
11 expert. *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015-16 (9th Cir.
12 2004) (internal quotations and citations omitted).

13 If the expert is deemed qualified, the court must then consider the reliability of the
14 expert’s opinions and conclusions. *Daubert*, 509 U.S. at 593-94. The Supreme Court
15 articulated several factors in *Daubert* that courts should consider in exercising this
16 function. These factors include: (1) whether the theory, technique, and background
17 knowledge the expert applies is generally accepted in the relevant scientific community;
18 (2) whether the research supporting the expert's conclusion has been subjected to peer
19 review and publication; (3) whether the expert's theory can be and has been tested; (4)
20 whether standards exist to control the operations of the expert's methods; and (5)
21 whether the known or potential rate of error is acceptable. *Daubert*, 509 U.S. at 593-94.
22 The inquiry, however, is a flexible one, with the focus solely on the principles and
23 methodology used, not on the conclusions they generate. *Id.* at 594; *see also Claar v.*
24 *Burlington N. R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (the district court is “both
25 authorized and obligated to scrutinize carefully the reasoning and methodology”
26 underlying the expert's testimony.)

27 Furthermore, it is “very significant” whether the expert is testifying “about matters
28 growing naturally and directly out of research they have conducted independent of

litigation, or whether they have developed their opinions expressly for the purpose of testifying.” *Allen v. Am. Capital Ltd.*, 287 F. Supp. 3d 763, 777 (D. Ariz. 2017) (citing *Daubert v. Merrell Down Pharm.*, 43 F.3d 1311, 1316 (9th Cir. 1995) (“*Daubert II*”). If the opinion is produced for litigation, the proffering party must provide “other objective, verifiable evidence that the testimony is based on ‘scientifically valid principles,’” such as peer review. *Id.* In assessing reliability, a court may peek beyond an expert’s methodology to his or her conclusion where “there is simply too great an analytical gap between the data and the opinion proffered.” *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).

1. Dr. Kelley

Slovak proffered the expert opinions of Dr. Kelley contained in an affidavit report, a declaration, and Dr. Kelley’s testimony. In his report, declaration and his testimony, Dr. Kelley opines that the note and deed of trust are “copies.” However, the court finds Dr. Kelley is not a qualified expert in the area of forensic document examination and his opinions are not supported by scientifically reliable or accepted methods or principles. Therefore, Dr. Kelley is excluded as an expert and his expert opinions are excluded from consideration by this court.

a. Qualifications

First, Dr. Kelley is not qualified to provide expert testimony regarding forensic document analysis as he lacks the requisite “knowledge, skill, experience, training, or education” in this field. Fed. R. Evid. 702. A review of Dr. Kelley’s qualifications and experience, as provided by his testimony, C.V., and declaration, reveals he has no special education, training, skill or experience related to any type of forensic document analysis. (See Pl. Hr’g Ex. 6; Pl. Hr’g Ex. 7; ECF No. 249, Hr’g Transcript).

Dr. Kelley has received no formal education specific to forensic science or forensic document examination. For example, he received his Bachelor of Arts degree from San Jose State University in mathematics, with a minor in chemistry and philosophy. (Pl. Hr’g Ex. 6, p. 6:004; ECF No. 249, p. 19). Thereafter, he received a

1 master's degree in electrical engineering and a Ph.D in electrical and computer
2 engineering both from the University of California, Santa Barbara. (Pl. Hr'g Ex. 6, p.
3 6:004; ECF No. 249, p. 16). None of Dr. Kelley's educational background includes any
4 classes, degrees, designations, or other educational background in forensic science or
5 document examination.

6 In addition, a review of Dr. Kelley's "prior experience" reveals that he has little to
7 no relevant experience related to forensic document examination. Dr. Kelley testified that
8 his prior work experience includes his work on nuclear reactor corporate design for
9 General Electric, work on the "Raytheon Missile Systems division" for the B-1 Bomber,
10 and anti-ballistic missiles. (ECF No. 249, p. 17). He also served as a mathematician for
11 Stanford Research Institute and ran his "own company for 10 years, building, . . . in-
12 circuit emulators for highly specialized computers." (*Id.*) During his testimony, he
13 summarized his work history from the time he was an undergraduate student to the
14 present as including various positions as a mathematician, engineer, work on various
15 weapons systems, various positions related to computer programs and software, and the
16 like. (*Id.*, pp. 20-23). However, he did not testify regarding any specific *work experience*
17 as a forensic document examiner.

18 Dr. Kelley's "C.V." and his declaration list various items that are entitled, "relevant
19 experience." However, a review of these items reveals none of them truly relate to any
20 "experience" in forensic document analysis. Rather, the relevant experience listed
21 pertains almost exclusively to Dr. Kelley's work involving engineering weapons systems,
22 computer systems or the like. (Pl. Hr'g Ex. 6, p. 6:002-6:003, 6:009). For example, Dr.
23 Kelley's C.V. states that his relevant experience includes designing "airborne radar and
24 electronic countermeasures" at various companies; developing and testing signal
25 processing that "permits the early detection of enemy aircraft and ground based threats
26 by fighter jets"; developing software used to identify and shoot down shoulder-launched
27 missiles; developing and applying cryptographic methods and software for password
28

1 protection on computers; and holding patents in “ultra high-speed” databases and
2 networking architecture. (*Id.*)

3 By contrast, the only items listed on his C.V. related to forensic document
4 examinations are his use of “computer graphics tools for the detection of anomalies in
5 documents and signatures that indicate that they are computer generated altered
6 documents;” (*Id.* at p. 6:002); his familiarity with “state and federal procedures” and his
7 “proffered testimony” and depositions “in connection with various document
8 examinations.” (*Id.* at p. 6:003); and his use of image-processing methods to test the
9 authenticity of documents . . . [this method he claims] is discussed in the Forensic
10 Documents Standards of the American Society of Testing Materials.” (*Id.*) None of these
11 items provide any specific relevant work experience in the area of forensic document
12 examination.

13 None of Dr. Kelley’s “specialties” are related to forensic document examinations
14 either. On his C.V., Dr. Kelley lists his “specialties” as “Chemistry through Organic and
15 Physical Chemistry” and “Reactor Core Design Physics.” (Pl. Hr’g Ex. 6, p. 6:004).
16 However, during his testimony, he stated that his “specializations” include “Part of the
17 PAT program . . . [which is] single processing and it has to do with image processing and
18 speech processing.” He stated that “in connection with that, [he] did create a radio for
19 Litton Industries for F-16 fire aircraft.” (ECF No. 249, p. 18). When specifically asked
20 whether any of his specialties “involve[d] forensic document examination,” his testimony
21 was evasive. He stated only that “procedures of forensic document examination involve
22 the use of scan, you know, photo scanners, microscopes, you know, and inspection,
23 according to the SWB doc and AST standards, and the procedures are specified in
24 there.” (*Id.*)

25 Dr. Kelley has also not received any specialized training in the area of forensic
26 document examination. When first asked about his “specialized training,” Dr. Kelley
27 testified that his only specialized training involved training as a “licensed private pilot with
28 a tail guarder certification and ... scuba.” (*Id.*, p. 19). He then identified taking courses on

1 nuclear reactor physics at Lowell Technical Institute and information theory at Stanford.
2 (*Id.*, p. 20). His C.V. also includes references to “training” in the use of Adobe Photoshop
3 and Illustrator. (Pl. Hr’g Ex. 6, p. 6:004).

4 When asked whether he had any specialized training or formal training in *forensic*
5 *document examination*, however, Dr. Kelley stated he did not. (ECF No. 249, pp. 29, 35,
6 84). Rather, he claimed there was no need for him to receive any specialized training in
7 forensic document examinations because these examinations involved things he already
8 knew such as “microscopes, scanners, the use of illumination, the equipment.” (*Id.*, p.
9 29) Finally, he testified that his training and experience related to forensic document
10 examinations came from reviewing one document in 2012 and then moving forward to
11 conduct additional examinations. (*Id.*, pp. 25, 35).

12 In contrast to his testimony, Dr. Kelley’s C.V. appears to claim that he does have
13 training in this area. However, a review of that “training” reveals Dr. Kelley has merely
14 taken training classes in such things as “digital phased radar and electronic
15 countermeasures,” “nuclear reactor physics,” “image processing,” “introduction to
16 printing,” Adobe Photoshop, image processing, and the like. (Pl. Hr’g Ex. 6, p. 6:004).
17 None this training relates, or appears to be in any way related to, forensics, forensic
18 techniques, or forensic document analysis or examinations.

19 Dr. Kelley is also not a member of any professional organization or group
20 specifically related to forensic document examination. According to both his testimony
21 and his C.V., he is a member of the following professional organizations: (1) the
22 Association of Computing Machinery; (2) the Institute of Electrical and Electronic
23 Engineers (IEEE); (3) Signal Processing (SIG IEEE); and, (4) Computational Intelligence
24 (SIG IEEE). (Pl. Hr’g Ex. 6, p. 6:005).

25 When specifically asked by the court whether he was a member of any
26 professional organization that was specifically related to forensic document examination,
27 Dr. Kelley’s responses, again, appeared to be evasive. For example, he testified that the
28 IEEE was a was an such organization because “they have specific research there to

1 auto the process of determining whether or not a document is authentic or by computer.”
2 (ECF No. 249, pp. 156-157). He then stated that the IEEE “covers a wide latitude of
3 electronic and electrical engineering tings. And one of the subgroups would be this
4 *forensic document stuff.*” (*Id.*) (emphasis added). However, he did not identify what
5 specific “subgroup” was related to this “forensic document stuff” nor did he claim he was
6 a member of that specific subgroup.

7 Dr. Kelley has not published any article, book or other document related to
8 forensic document examinations. (*Id.*, p. 93). In addition, Dr. Kelley has never taught any
9 courses, seminars, or classes related to forensic document examination. (*Id.*, pp. 157-
10 158). He has also never provided any lectures on this subject – save and except the
11 “demonstrations” he testified he had done for “groups of lawyers and people like that.”
12 (*Id.*)

13 In sum, after considering Dr. Kelley’s testimony and the evidence presented at the
14 evidentiary hearing, the court finds there is no evidence in the record that Dr. Kelley
15 received any specific education or training in the area of forensic document analysis or
16 examination. The court rejects Dr. Kelley’s testimony and claims that his knowledge in
17 using microscopes, scanners, imaging technology, or computer programs provides him
18 the requisite skill or knowledge to be an expert in the area of forensics, forensic
19 sciences, or forensic document analysis or examinations.

20 In addition, the court finds that Dr. Kelley lacks the required prior relevant work
21 experience or professional experience to qualify as an expert in this area. Although Dr.
22 Kelley may very well be an “expert” in such things as “electrical and computer
23 engineering,” this does not make him an expert in the forensic examination of
24 documents. Therefore, Dr. Kelley simply does not possess the requisite “scientific
25 knowledge” required to qualify as an expert in the field of forensic document
26 examinations. On this basis alone, the proffered expert opinions and reports prepared by
27 Dr. Kelley are not admissible and will not be considered by the court for any purpose.

28 ///

b. Reliability of Methods Used by Dr. Kelley

In addition, Dr. Kelley's methods are not reliable as required under *Daubert* and Rule 702. Therefore, even if Dr. Kelley was a qualified expert, his expert opinions and reports are still inadmissible on this additional basis.

At the hearing, Dr. Kelley described the methods he used to reach his opinions that the documents at issue were copies as follows. First, he testified that he physically inspected the documents for a period of time. (ECF No. 249, p. 40). He then scanned the documents and took several photographs of the documents using his microscope. (*Id.*, pp. 41, 46). After taking these scans and photographs, Dr. Kelley took the photographs back to home and allegedly applied the following "standards" for forensic document examination: (1) the American Society of Testing Materials, Int'l ("ATSM"), Standard Guide for Examination of Documents Produced with Liquid Ink Jet Technology (Pl. Hr'g Ex. 8); and, (2) Scientific Working Group for Forensic Document Examination ("SWGDOC"), Standard for Examination of Documents Produced with Ink Jet Technology. (ECF No. 249, pp. 49, 92). He testified that these two standards are essentially identical and that he is looking for certain "characteristics" described in these standards. (*Id.*, pp. 27-28). He also testified that he "measured" the size of the documents to determine if there were anomalies. (*Id.*, pp. 117-122). Based on his review of the documents, his measurements, and his alleged application of these standards, such as an examination of spray patterns or the like, Dr. Kelley concluded the documents tendered by Wells Fargo were not "original documents." Rather, the documents were copies generated by an "ink jet printer." (*Id.*, pp. 61-62; 65; 68).

However, when ATSM and SWGDOC standards are reviewed, it is clear Dr. Kelley did not properly apply them nor did he apply them in the means that they are intended. These standards only apply to documents *originally produced* with an ink jet printer. (Pl. Hr'g Exs. 8, 9). In other words, the standards and methods of the ATSM and SWGDOC alleged used by Dr. Kelley pertain to how to examine a document that is *known* to be created by an ink jet printer prior to any examination taking place. (*Id.*)

1 These standards specifically state that the procedures outlined in them can be used for a
2 forensic document examiner to “reliably reach an opinion concerning whether two or
3 more documents *produced* with the ink jet printer technology are from the *same device*,
4 whether *the particular device created* the document, or the determination of the *make or*
5 *model of the device*.” (Pl. Hr’g Ex. 8, p. 8:002, ¶ 4; Pl. Hr’g Ex. 9, p. 9:002, ¶ 4)
6 (emphasis added).

7 This is not how Dr. Kelley’s used these standards. Rather, his methodology
8 attempts to use these standards in reverse. Specifically, his methodology involves taking
9 a photograph or scan of an original document and then attempting to prove the
10 document – which is purported to be an original – was actually created by an ink jet
11 printer. His methodology has nothing to do with attempting to determine which ink jet
12 device was used to create a document or if two documents were produced by the same
13 device, which he acknowledged during cross-examination. (ECF No. 249, pp. 81-82).

14 There is no evidence in the record that establishes Dr. Kelley’s methodology or
15 his use of the standards in this way are reliable to determine that a document is a “copy”
16 or a “forgery.” To the contrary, according to Dr. Kelley, these methods have never been
17 subjected to peer review or to any error-rate testing. (*Id.*, pp. 94-96). Dr. Kelley testified
18 “there’s no way of doing an error rate” on his methods. (*Id.*) Rather, he merely stated that
19 “there is university documents, like at Purdue forensic labs . . . and they have, you know,
20 identified ink jet things.” (*Id.*, p. 96).

21 This is further underscored by the fact that Dr. Kelley has not been qualified as an
22 expert in several cases other cases. Although Dr. Kelley’s C.V. and declaration list a
23 variety of cases that Dr. Kelley claims he was retained in and served as an “expert,” the
24 court was unable to verify these claims and his testimony conflicts with the information
25 provided on these documents. For example, on his C.V., Dr. Kelley listed numerous
26 cases in which he claims he served as an expert witness for forensic document
27 examination. (Pl. Hr’g Ex. 6, pp. 6:005-6:009). Yet, in his declaration, he indicated he
28 only *testified* in two cases that proceeded to trial. (Pl. Hr’g Ex. 7, p. 7:001.) The cases

1 listed in his declaration are: *Pembroke v. US Bank, et. al.*, District Court, County of
 2 Jefferson, Colorado, Case No. 214-CV-30592 and *Bank of New York v. Didrick*, 20th
 3 Judicial District, Collier County, FL, Case No. 12-380-CA. (*Id.*) However, Dr. Kelley was
 4 actually excluded as an expert witness in the *Bank of New York Mellon v. Didrick* case in
 5 Florida.⁴

6 In addition, Dr. Kelley's testimony related to his prior work as an expert appeared
 7 to conflict with the information provided in his C.V. and his declaration and lacked
 8 credibility. For example, when asked about his prior experience as an expert witness, Dr.
 9 Kelley stated he testified "20 or 30 times." (ECF No. 249, p. 37). However, when asked
 10 to exclude times in which he was merely deposed, Dr. Kelley then stated he had only
 11 testified approximately "10 times." (*Id.*, p. 39).

12 As it turns out, it appears Dr. Kelley has been excluded as an expert in forensic
 13 document examination by other federal courts. See *Malin v. JP Morgan Chase Bank,*
 14 *N.A., et. al.*, Case No. 3:11-cv-00554-TAV-HBG, Order Excluding Dr. Kelley's Expert
 15 Opinions, Docket No. 84 (E.D. Tenn., May 7, 2013); *McDonald v. Onewest Bank, FSB,*
 16 *et. al.*, 2:10-cv-01952-RSL, ECF No. 298 (W.D. Wash. Aug. 23, 2013).⁵ In fact, after an
 17 extensive search, the court was unable to locate any federal case wherein Dr. Kelley has
 18 been qualified as an expert in forensic document examination or where his methods
 19 have been deemed reliable.

20 In addition, Dr. Kelley has also been excluded from appearing as an expert
 21 forensic document examiner in state courts. See *e.g.*, *JP Morgan Chase Bank v.*

23 ⁴ The court takes judicial notice of the court filings in *Bank of New York Mellon, et.*
 24 *al. v. Didrick*, 20th Judicial District Court, FL, Case No. 11-2012-CA-003870 pursuant to
 25 Fed. R. Evid. 201. The electronic docket for this court is located at:
 26 <https://cms.collierclerk.com/cmsweb#!/casedetails>, last visited 12/27/2018. A review of
 27 the docket reveals that Plaintiff filed a motion in limine to exclude Dr. Kelley as an expert
 28 in the case. See, Docket No. 87. This motion was granted by the court on June 16,
 2014. See, Docket Number 101.

⁵ The court takes judicial notice of the Dockets and filings in these federal cases.
 Fed. R. Evid. 201.

1 Stevens, Case No. 104835, 2017 Ohio App. LEXIS 3303, **13-14 (8th App. Dist. Ohio,
 2 August 10, 2017) (upholding magistrate's rejection of Dr. Kelley as an "expert" under
 3 Ohio state Rule 702, which mirrors the federal rule); *Bank of New York Mellon, et. al. v.*
 4 *Didrick*, 20th Judicial District Court, FL, Case No. 11-2012-CA-003870 (excluding Dr.
 5 Kelley as expert witness). Ultimately, on cross-examination he acknowledged that he
 6 had been excluded as an expert in several cases. (ECF No. 249, p. 90).

7 Therefore, the court finds that Dr. Kelley's methods are also unreliable. Pursuant
 8 to Rule 702 and *Daubert*, Dr. Kelley's proffered testimony and evidence is not admissible
 9 and will not be considered by the court for any purpose in this case.

10 2. Mr. Michaels

11 Next, Slovak submitted a C.V. and "forensic examination report" prepared by Gary
 12 Michaels. (ECF No. 218, Exs. 9, 11). Mr. Michaels's report also concludes the
 13 documents are not only copies, but that they are "forgeries." (ECF No. 218, Ex. 11, p. 10,
 14 ¶ 22). However, this conclusion is not based on any personal analysis or tests conducted
 15 by Mr. Michaels. Although Mr. Michaels report states he, "examined the questioned
 16 documents," Mr. Michaels was not in Las Vegas to physically examine the tendered
 17 documents. (ECF No. 249, p. 166-167). Rather, Mr. Michaels reviewed the
 18 "photographs" of the documents taken by Dr. Kelley and the conclusions reached by Dr.
 19 Kelley. (ECF No. 218, Ex. 11, 8, ¶ 11). From that "review," Mr. Michaels "opined" that
 20 Dr. Kelley's conclusions were correct and he "agreed" the documents are "copies" and
 21 opined that they are "forgeries." (*Id.*, 10, ¶¶ 16-17, 22).

22 In this instance, even assuming *arguendo* that Mr. Michaels is a qualified expert in
 23 the area of forensic document analysis and examinations, his report is not admissible
 24 and will not be considered by the court. In this instance, Mr. Michaels did not personally
 25 examine or even see the original documents. Rather, he simply reviewed the
 26 photographed copies of the documents and the opinions reached by Dr. Kelley and
 27 opined that those conclusions are accurate. Mr. Michaels opinions are not "expert"
 28 opinions – but opinions that Dr. Kelley's opinions are correct. His report is nothing more

1 than an attempt to bolster the credibility of Dr. Kelley and the legitimize "opinions"
2 reached by him. This type of "expert" testimony is not proper and is impermissible. See
3 *e.g.*, *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1995) (holding an expert is
4 not permitted to testify specifically to bolster the credibility of another witness); *United*
5 *States v. Shay*, 57 F.3d 126, 131 (1st Cir. 1995) (expert testimony that is presented for
6 the sole purpose to bolster the testimony of another witness is properly excluded); *Tunis*
7 *Bros. Co. v. Ford Motor Co.*, 124 F.R.D. 95, 98 (E.D. Pa. 1989) (expert testimony offered
8 to simply vouch for another expert is inappropriate). Therefore, the court finds that the
9 proffered evidence of Mr. Michaels is also inadmissible and will not be considered by the
10 court.

11 As such, Slovak has provided no admissible evidence to support his claims that
12 the documents are "copies" and/or "forgeries" and no evidence to support the motion for
13 sanctions against Wells Fargo, Snell or the individual attorneys. Therefore, the court
14 denies Slovak's motion for sanctions in its entirety.

15 **IV. CONCLUSION**

16 **IT IS THEREFORE ORDERED** that Plaintiff's motion for sanctions (ECF No. 218)
17 is **DENIED**.

18 **DATED:** January 15, 2019.

19
20 
21 **UNITED STATES MAGISTRATE JUDGE**